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No. 90-547
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

KENNETH B. QUANSAH, JR.,

Petitioner,

v.

CITY OF NEW YORK, et al.,

Respondents.

BRIEF OF RESPONDENTS CITY OF NEW YORK AND POLICE DEPARTMENT, CITY OF NEW YORK IN OPPOSITION TO A PETTTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 9, 1990

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Was petitioner's pro se complaint properly dismissed, without prejudice, for failure to state a claim?

2. Were petitioner's state law claims properly dismissed on the additional ground that the complaint failed to allege compliance with the New York General Municipal Law?

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STATEMENT OF THE CASE

The instant petition seeks review of a Court of Appeals order affirming the dismissal of petitioner's pro se complaint, which alleged false arrest and various related claims. By an order dated March 6, 1990, the Second Circuit unanimously affirmed the judgment dismissing petitioner's

complaint, without prejudice, for failure to state a claim. Fed. R. Civ. P. 12(b)(6). By an order dated May 7, 1990, the Second Circuit denied petitioner's petition for rehearing.

A. Petitioner's Earlier Litigation

The complaint in Quansah v. Baruch alleged that petitioner had been enrolled at a junior college of the City University of New York (CUNY). He expected to be awarded a degree in August 1975, but did not meet the academic requirements for graduation. Thereafter, on the basis of his Bronx Community College credits, petitioner enrolled at Bernard M. Baruch College, a senior college of CUNY. Because of the poor grades petitioner received during his years at Baruch, he was placed on academic probation. Petitioner failed to improve his academic average sufficiently to permit him to register for

further coursework, and he was never graduated from Baruch.

The District Court for the Southern District of New York dismissed the complaint in Quansah v. Baruch, with leave to replead so that petitioner could allege with particularity any claim of racial discrimination. By an order filed August 7, 1981, the District Court dismissed the complaint with prejudice. Because petitioner's notice of appeal from that order was not filed until December 18, 1981, the New York City Corporation Counsel moved to dismiss petitioner's appeal as untimely. By an order filed May 4, 1982, the Court of Appeals for the Second Circuit dismissed the appeal in Quansah v. Baruch.

B. Events Leading up to the Present Litigation

More than five years after the dismissal of the appeal in Quansah v. Baruch, petitioner began telephoning the office of the Corporation Counsel and sending purported

notices of settlement conferences in the case which was no longer pending. On at least two occasions, petitioner appeared in person at the office of the Corporation Counsel. The first such visit was on October 27, 1987, at which time the chief clerk of this office's Appeals Division met with petitioner and tried to explain that the appeal had been dismissed.

On December 3, 1987, petitioner reappeared at this office without an appointment, and demanded to speak to the Corporation Counsel to arrive at a settlement. Numerous civilian employees told petitioner that the Corporation Counsel could not meet with him and asked that petitioner leave the premises. After more than two hours, New York City police officers arrived and arrested petitioner when he persisted in his refusal to leave.

Petitioner alleges that he was in custody until his arraignment on

December 6, 1987, on the charge of criminal trespass in the third degree (N.Y. Penal L. §140.10). That charge ultimately resulted in an adjournment in contemplation of dismissal following a bench trial. By an order dated February 4, 1988, the Criminal Court of the City of New York ordered that during the six-month period expiring August 4, 1988, petitioner was not to enter the premises where the Corporation Counsel's office is located unless he had written permission to do so or unless he had legal papers to serve.

C. **Petitioner's Present Litigation**

On January 13, 1989, the New York City Police Department was served with the complaint in the instant case.[1] The complaint alleged federal jurisdiction and

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[1]The Corporation Counsel thus appeared on behalf of the City of New York and the Police Department; jurisdiction was never obtained over the remaining respondents.

venue under 28 U.S.C. §§1332 and 1391. The first cause of action alleged violations of 42 U.S.C. §§1981 and 1985(b) [sic], deprivation of liberty under the fourteenth amendment, false arrest and false detention. As and for his second cause of action, petitioner alleged libel, slander, and negligence for the supposed recording of false charges on his police record and the dissemination of such charges to other jurisdictions.

Respondents moved pursuant to Fed. R. Civ. P. 12(b)(6) for an order dismissing this action upon the grounds that the complaint fails to state a claim and that petitioner's state tort claims are barred by N.Y. Gen. Mun. L. §§50-e and 50-i. Petitioner opposed respondents' motion by an unsworn affidavit in which he disavowed any §1983 or tort claim.

By an order dated June 26, 1989, the District Court for the Southern District of

New York granted respondents' motion to dismiss the complaint, without prejudice to petitioner's refiling a complaint on or before July 31, 1989. A judgment to this effect was filed in the District Court on July 6, 1989. Petitioner never filed an amended complaint, but instead took an appeal to the Court of Appeals for the Second Circuit.

REASONS FOR DENYING THE WRIT

The instant petition contains numerous misstatements of fact and law, and fails to present an issue warranting review by this Court. The deficiencies of petitioner's complaint are readily apparent, notwithstanding the less stringent standard by which pro se pleadings are judged under the rule of Haines v. Kerner, 404 U.S. 519 (1972). The Courts below correctly applied this standard and made every effort to explain why the complaint was dismissed.

To flesh out his complaint, petitioner has included matters outside the record. He

also suggests arguments that were not raised in the lower courts. A party may not allege on appeal what he failed to claim below.

In his complaint, petitioner alleged that his arrest at the office of the Corporation Counsel deprived him of rights under 42 U.S.C. §§1981 and 1985. Based on the misguided conviction that his original appeal was still pending, petitioner claims he was entitled to a fair settlement of that earlier action.

Section 1981 prohibits only purposeful racial discrimination. General Building Contractors Association, Inc. v. Pennsylvania, 458 U.S. 375, 387, 389 (1982); Runyon v. McCrary, 427 U.S. 160, 168 (1976). To state a claim under §1981, therefore, the plaintiff must allege racial animus or a racially-motivated misuse of power. Where, as here, the complaint sets forth no allegations regarding petitioner's race, the pleading is fatally deficient.

Section 1985 claims also require much more than the vague and conclusory allegations set forth in petitioner's complaint. A claim of conspiracy to violate civil rights requires detailed fact pleading. The provision upon which petitioner relies also requires precise allegations of class-based animus. Griffin v. Breckenridge, 403 U.S. 88 (1971). Thus, even if the complaint were read as sufficiently making out a claim of conspiracy, it would still be subject to dismissal for failure to allege that the conspiracy had the requisite purpose.

The final federal claim alleged in petitioner's complaint is an assertion that he was deprived of his liberty in violation of the fourteenth amendment.[2] Since Monell v.

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[2]Such a claim cannot be made without invoking 42 U.S.C. §1983, which provides a cause of action for those alleging fourteenth amendment violations. Thus, respondents assumed that this is in the nature of a §1983 (Footnote Continued)

New York City Department of Social Services, 436 U.S. 658 (1978), the City has been considered a "person" within the meaning of §1983. The City is, however, liable only for its own actions, and cannot be liable under any theory of respondeat superior. In the absence of proof that a municipal policy caused petitioner the requisite injury, §1983 provides no remedy. Since petitioner alleged, at best, a single highly unusual incident which is not claimed to result from any municipal policy, he failed to state a claim under Monell and its progeny.

The complaint also included conclusory allegations of false arrest, false detention, libel, slander, and negligence. These are causes of action which sound in tort and are governed by state law. As such, they

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(Footnote Continued)
claim; however, petitioner's opposing "affidavit" disavowed any intent of the kind.

cannot be maintained unless petitioner complies with the pleading requirements of the New York General Municipal Law. Every complaint seeking damages from the City for this kind of injury must include the allegation that thirty days have passed since service of a timely notice of claim. The notice of claim required by N.Y. Gen. Mun. L. §50-e is a condition precedent to municipal liability. Absent properly pleaded and timely compliance with §50-e petitioner cannot pursue his state tort claims.[3]

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[3]Although petitioner did not allege that he is a citizen of a state outside New York, his complaint listed a California mailing address and alleged federal jurisdiction under 28 U.S.C. §1332. If there was true diversity of citizenship in the case at bar, the District Court may have had jurisdiction over the state law causes of action even if petitioner's constitutional claims are deficient and pendent jurisdiction is lacking. Respondents therefore argued that the tort claims alleged in the complaint are dismissible on this alternate ground.

For all the above reasons, the District Court, as affirmed by the Court of Appeals, correctly determined that petitioner's complaint was defective and that it could not withstand respondents' motion to dismiss. Petitioner waived any right to amend his complaint by refusing to accept the District Court's invitation to replead. Accordingly, there is no merit to petitioner's suggestion that he, as a pro se litigant, is entitled to further consideration of his claims.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

October 9, 1990

Respectfully submitted,

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